South Carolina Law Review

Volume 66
Issue 4 *ANNUAL SURVEY OF SOUTH CAROLINA LAW*

Article 13

Summer 2015

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Recommended Citation

James W. Harlow, Does the Calculation Matter - The Federal Sentencing Guidelines and the Doctrine of Alternate Variance Sentences, 66 S. C. L. Rev. 987 (2015).

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DOES THE CALCULATION MATTER? THE FEDERAL SENTENCING GUIDELINES AND THE DOCTRINE OF ALTERNATE VARIANCE SENTENCES

James W. Harlow*

I. INTRODUCTION

The Federal Sentencing Guidelines play a central role in the sentencing of federal criminal defendants. A decade ago, in *United States v. Booker*,[1] the Supreme Court undercut the original purpose for the Guidelines—to bring binding structure to a previously discretionary sentencing scheme—by declaring that the Guidelines were advisory only.[2] Henceforth, judges were no longer

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1. 543 U.S. 220 (2005).

2. *See id.* at 233–35, 244 (2005) (holding that mandatory application of the Federal Sentencing Guidelines violated the Sixth Amendment); *id.* at 245 (remedying the constitutional infirmity by making the Guidelines advisory rather than mandatory). Much ink has been spilled discussing the pre-*Booker*, mandatory Guidelines era, including, for example, Frank O. Bowman III, *The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 WIS. L. REV. 679, 690–704, and Katie Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993).

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bound by the sentencing ranges prescribed by the Guidelines. Instead, judges were to consider the Guidelines as one of several statutory factors before exercising their discretion to select a sentence that was "sufficient, but not greater than necessary."[3]

Even though advisory, the Guidelines remain at the procedural heart of the sentencing process and provide "the framework for sentencing."[4] All sentencing proceedings in the district court begin with the proper calculation of the advisory Guidelines range.[5] Similarly, on review, the courts of appeals initially determine whether the sentencing process was free of procedural errors, including whether the advisory Guidelines range was correctly calculated.[6]

The framework of the law often affects its output, and federal sentencing would appear to be no exception. But what happens when form may not affect substance?

After all, the Guidelines are no longer the beginning and end of a sentencing hearing. A district court may not facilely presume that a Guidelines sentence is appropriate.[7] Rather, a defendant's advisory Guidelines range is but one of several important factors enumerated in 18 U.S.C. § 3553(a) that a sentencing court must consider.[8] Consideration of the other section 3553(a) factors—which include the need "to promote respect for the law," "to afford adequate deterrence," and "to protect the public" from the defendant—may prove more persuasive, if not determinative, in a particular sentencing.[9]

In such a case, when other, non-Guidelines considerations clearly steered the sentencing court's discretion, should it matter whether the advisory Guidelines range was correctly calculated in the first place? Provided certain elements are met, the Fourth Circuit would answer no. This is an exception to the principle

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3. 18 U.S.C. § 3553(a) (2012); *see* Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1480–81 (2008) ("While the Guidelines remain extant, the remedy in *Booker* alters the status of the Guidelines significantly and opens the possibility of an evolving sentencing law that draws on the judgment and experience of sentencing judges themseleves.").

4. Peugh v. United States, 133 S. Ct. 2072, 2083 (2013); *see id.* at 2084 (referring to the Guidelines as "the lodestone of sentencing"); Gall v. United States, 552 U.S. 38, 49–50 (2007) ("As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.").

5. *See, e.g.*, *Gall*, 551 U.S. at 49 ("[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range.").

6. *See, e.g.*, *Peugh*, 133 S. Ct. at 2083 ("Indeed, the rule that an incorrect Guidelines calculation is procedural error ensures that they remain the starting point for every sentencing calculation in the federal system."); *Gall*, 552 U.S. at 51.

7. Nelson v. United States, 555 U.S. 350, 352 (2009) (per curiam).

8. *See Gall*, 552 U.S. at 49–50 (citing 18 U.S.C. § 3553(a) (2012)); *see also* Stith, *supra* note 3, at 1489 (noting that the Supreme Court's post-*Booker* cases "explicitly affirm the important role of the sentencing judge, not simply finding facts that the Guidelines provide are relevant to punishment, but in judging the statutory purposes of sentencing including the justness of punishment in the case at hand").

9. *See* § 3553(a) (setting forth the factors to be considered by district courts when imposing sentence).

that an improperly calculated advisory Guidelines range constitutes a significant procedural error, meriting that a sentence be vacated.[10]

This Article examines the Fourth Circuit's emergent and evolving doctrine of alternate variance sentences.[11] Under this doctrine, a sentence will not be vacated even if the sentencing court may have erred when calculating the advisory Guidelines range.[12] If it is clear from the record that an advisory Guidelines issue did not influence the ultimate sentence, the appellate panel will assume any Guidelines errors are harmless and proceed to evaluate whether the sentence is substantively reasonable.[13]

At first glance, the doctrine might seem to involve nothing more than the elimination of a little bit of formalism from the sentencing review process. In fact, its increasingly frequent application has a significant impact on all actors in the federal criminal sentencing process—prosecutors, defense counsel, defendants, and judges. Moreover, the doctrine implicates important debates about the meaning and effect of the Guidelines after *Booker*, the distribution of power between district and appellate judges in sentencing, and judicial efficiency.

This Article proceeds in several parts. Part I briefly outlines the process followed by district and appellate courts in imposing and reviewing sentences. Part II introduces and provides the initial contours of the doctrine. Part III incorporates subsequent developments in the Fourth Circuit and describes the current state of the doctrine. Part IV discusses the important normative considerations implicated by alternate variance sentences, including the doctrine's potential criticisms and defenses. Finally, the Article concludes.

II. PROCESS OF FEDERAL CRIMINAL SENTENCING

This Part contextualizes the doctrine of alternate variance sentences by briefly detailing the sentencing minuet followed by district and appellate judges. Although this Part describes a routine well known to judges and federal criminal practitioners, it is this process that led to the doctrine's rise and which the doctrine in turn has influenced.

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10. *See, e.g.*, United States v. Abu Ali, 528 F.3d 210, 260 (4th Cir. 2008) ("A sentence based on an improperly calculated guidelines range will be found unreasonable and vacated.").

11. As a matter of nomenclature, Fourth Circuit Judge Dennis Shedd used the term "alternate variance sentence" in his concurring opinion in *United States v. Alvarado Perez*, 609 F.3d 609, 620 (4th Cir. 2010) (Shedd, J., concurring).

12. *See generally id.* at 620 (citing United States v. Keene, 470 F.3d 1347, 1350 (11th Cir. 2006) ("Applying [the] analysis to the facts before it, the Eleventh Circuit concluded that even if there was any misapplication of the guideline enhancement, 'the error did not affect the district court's selection of the sentence imposed.'")).

13. *See id.* (citing United States v. Mehta, 594 F.3d 277, 283 (4th Cir. 2010)).

Upon a defendant's entry of a guilty plea or conviction after trial, the district judge schedules a sentencing hearing for a future date.[14] In the interim, the United States Probation Office prepares a presentence report about the defendant for the court, which, among other things, details the defendant's conduct, history, and characteristics and calculates the defendant's advisory Guidelines range with any applicable enhancements, adjustments, and departures.[15]

At the sentencing hearing, the district court begins "by considering the presentence report and its interpretation of the Guidelines."[16] As a practical matter, the court usually starts by resolving any objections raised by the government, the defendant, or the court itself to the Presentence Report and the Guidelines calculation.[17] These objections may be factual (such as whether evidence supports applying a particular Guidelines provision in a case), or legal (such as Guidelines provision's broader construction). To resolve these objections—particularly factual objections—the court may need to receive exhibits or hear from witnesses to make its factual findings. As a result, debates about some advisory Guidelines provisions may become like mini-trials.

Having resolved any objections to the presentence report, the court must calculate the defendant's Guidelines range.[18] The Guidelines calculation is itself an eight-step process that begins with determining the applicable offense guideline, moves through the offense level, enhancements and adjustments, and ends with sentencing options.[19] The court then considers any motions to depart upward or downward from the Guidelines range,[20] before announcing the final, advisory Guidelines range.

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14. *See* FED. R. CRIM. P. 32(b) ("The court must impose sentence without unnecessary delay.").

15. FED. R. CRIM. P. 32(c)–(d).

16. United States v. Evans, 526 F.3d 155, 160 (4th Cir. 2008) (quoting Rita v. United States, 551 U.S. 338, 351 (2007)); *see* FED. R. CRIM. P. 32(i)(3). However, the court need not rule on an objection if the "matter will not affect sentencing, or because the court will not consider the matter in sentencing." FED. R. CRIM. P. 32(i)(3)(B).

17. *See Evans*, 526 F.3d at 160; *see also* FED. R. CRIM. P. 32(i)(3). However, the court need not rule on an objection if "matter will not affect sentencing, or because the court will not consider the matter in sentencing." *Id.* 32(i)(3)(B).

18. *See* 18 U.S.C. § 3553(a)(4) (2012) (requiring a district court to consider at sentencing the applicable Guidelines range).

19. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(a) (2014). Depending upon when the offense conduct occurred and whether the relevant Guidelines provisions have been amended, a court may have to compare several different versions of the Guidelines. *See* Peugh v. United States, 133 S.Ct. 2072, 2078 (2013) (requiring, to avoid ex post facto violation, determination of whether Guidelines version in effect at the time of sentencing "provides a higher applicable Guidelines sentencing range than the version in place at the time of the offense").

20. U.S.S.G. § 1B1.1(b); *see also id.* §§ 5K1.1–5K3.1 (listing various grounds for departure). Although the difference between a departure and a variance is less material after *Booker* and the steps often are conflated, they remain distinct steps.

With the Guidelines calculation complete, the court addresses the factors enumerated in 18 U.S.C. § 3553.[21] This step allows the court to consider a number of broader, often intangible elements like the need for the sentence "to promote respect for the law," "to protect the public," and "to avoid unwarranted sentence disparities."[22] When considering the section 3553(a) factors, the court also may determine whether it should impose a variance sentence from that recommended by the advisory Guidelines range.[23] Finally, the court pronounces a sentence.

In the event of an appeal, the appellate court reviews all sentences for both procedural and substantive reasonableness under the "abuse-of-discretion standard."[24] The court always begins with procedural reasonableness, which "evaluates the method used to determine the defendant's sentence."[25] Procedural errors include "failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the [section] 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range."[26] Most relevant here, the Fourth Circuit has recognized that sentences "based on an improperly calculated [G]uidelines range will be found unreasonable and vacated."[27]

If the district court "committed no significant procedural error," the appellate court proceeds to review the sentence for substantive reasonableness.[28] Substantive reasonableness review "examines the totality of the circumstances to see whether the sentencing court abused its discretion in concluding that the sentence it chose satisfied the standards set forth in [section] 3553(a)."[29] It is not enough to vacate a sentence if the appellate court would have imposed a different sentence.[30] Even for sentences that vary from the Guidelines, the court looks to whether the district court's analysis of the section 3553(a) factors justified the variance, but still owes due deference to the district court's decision.[31] However,

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21. *See id.* § 1B1.1(c) (instructing that the court move on to the section 3553(a) factors only after it has completed the Guidelines calculation).

22. 18 U.S.C. § 3553(a)(2)(c), (a)(6).

23. Irizarry v. United States, 553 U.S. 708, 714–15 (2008) (citing 18 U.S.C. § 3553(a)).

24. Gall v. United States, 552 U.S. 38, 51 (2007).

25. United States v. Mendoza-Mendoza, 597 F.3d 212, 216 (4th Cir. 2010).

26. United States v. Morace, 594 F.3d 340, 345 (4th Cir. 2010) (quoting *Gall*, 552 U.S. at 51).

27. United States v. Abu Ali, 528 F.3d 210, 260 (4th Cir. 2008).

28. *Morace*, 594 F.3d at 345 (quoting *Gall*, 552 U.S. at 51).

29. *Mendoza-Mendoza*, 597 F.3d at 216 (citing *Gall*, 552 U.S. at 51).

30. *See* United States v. Evans, 526 F.3d 155, 162 (4th Cir. 2008) (citing *Gall*, 552 U.S. at 51).

31. *See* United States v. Diosdado-Star, 630 F.3d 359, 365–66 (4th Cir. 2011); *Evans*, 526 F.3d at 162 (citing *Gall*, 552 U.S. at 51) (observing that the amount of justification depends on the size of the variance).

if after giving due deference to the district court, a sentence still found to be substantively unreasonable will be vacated.[32]

III. ESTABLISHING A DOCTRINE

This Part explores the trio of cases that firmly established the doctrine of alternate variance sentences in Fourth Circuit jurisprudence. The final case of the trio also featured the first robust dissent to the doctrine.

A. United States v. Savillon-Matute

The doctrine of alternate variance sentences was established in the Fourth Circuit in *United States v. Savillon-Matute*.[33] In *Savillon-Matute*, the defendant, who had been convicted of illegal reentry into the United States, challenged whether his prior Maryland state court assault conviction triggered an eight-level enhancement under the Guidelines as a "aggravated felony" or a sixteen-level enhancement as a "crime of violence."[34] The district court ultimately applied the eight-level enhancement, calculated the Guidelines range to be 12–18 months, and sentenced the defendant to 36 months' imprisonment, but not before navigating a difficult stretch of jurisprudence about how to analyze the Guidelines enhancement issue.[35]

Aside from the Guidelines calculation, the sentencing court explicitly tied its sentence to the section 3553(a) factors.[36] Among other things, the district judge stated that it "may be the first time" he would "go upward" under section 3553(a) because "there comes a point when enough is enough."[37] The sentencing court concluded "a three year sentence is absolutely the appropriate sentence in this case."[38]

On appeal, the defendant argued that the court erroneously applied the eight-level enhancement to calculate his Guidelines range.[39] But the Fourth Circuit declined to "wad[e] into the morass" necessary to resolve the Guidelines issue because it did not affect the outcome of the case.[40]

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32. *See* United States v. Heath, 559 F.3d 263, 266 (4th Cir. 2009) (citing United States v. Curry, 523 F.3d 436, 439 (4th Cir. 2008)).

33. 636 F.3d 119 (4th Cir. 2011). Although established in *Savillon-Matute*, the doctrine was introduced to the Fourth Circuit by Fourth Circuit Judge Dennis Shedd in two concurring opinions. *See* United States v. Alvarado Perez, 609 F.3d 609, 619–22 (4th Cir. 2010) (Shedd, J., concurring); United States v. Lee, 321 F. App'x 298, 302 (4th Cir. 2009) (Shedd, J., concurring). Judge Shedd became the agent of his own success when he authored the opinion for the court in *Savillon-Matute*.

34. *Savillon-Matute*, 636 F.3d at 121–22.

35. *See id.*

36. *See id.* at 122.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 123.

Instead, the *Savillon-Matute* court established a doctrinal framework to elide the Guidelines issue. The doctrinal foundation rests upon standards of review broadly applicable to sentencing issues. Procedural errors during sentencing, including miscalculations of the Guidelines range, "are routinely subject to harmlessness review."[41] When conducting harmless error review, the Fourth Circuit "commonly assume[s], without deciding, an error."[42] A "[s]entencing error is harmless if the resulting sentence is not longer than that to which the defendant would otherwise be subject."[43]

Upon the assumed harmless error standards, the *Savillon-Matute* court erected two doctrinal requirements. First, the appellate court needs "knowledge that the district court would have reached the same result even if it had decided the guidelines issue the other way."[44] Under section 3553(a), the district court possesses the authority to impose a sentence irrespective of the Guidelines,[45] so the appellate court needs sufficient indicia that this authority is being invoked.

Second, the appellate court assumes without deciding that the defendant correctly alleges error in the Guidelines calculation,[46] and "determin[es] that the sentence would be reasonable even if the guidelines issue had been decided in the defendant's favor."[47] Through this requirement, the appellate court engages in its normal exercise of substantive reasonableness review, but it does so with

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41. *Id.* (quoting Puckett v. United States, 556 U.S. 129, 141 (2009)). *See, e.g.*, Williams v. United States, 503 U.S. 193, 203 (1992) (stating, before *Booker*, "once the court of appeals has decided that the district court misapplied the Guidelines, a remand is appropriate unless the reviewing court concludes, on the record as a whole, that the error was harmless, i.e., that the error did not affect the district court's selection of the sentence imposed"); United States v. Lynn, 592 F.3d 572, 576 (4th Cir. 2010) (discussing harmlessness review of alleged procedural sentencing errors). The Supreme Court's recent *Peugh* decision also acknowledges that Guidelines-related errors may be harmless. *See* Peugh v. United States, 133 S. Ct. 2072, 2088 n.8 (2013) ("There may be cases in which the record makes clear that the District Court would have imposed the same sentence under the older, more lenient Guidelines that it imposed under the newer, more punitive ones. In such a case, the ex post facto error may be harmless.").

42. *Savillon-Matute*, 636 F.3d at 123.

43. United States v. McManus, 734 F.3d 315, 318 (4th Cir. 2013) (quoting United States v. Mehta, 594 F.3d 277, 283 (4th Cir. 2013) (alterations and internal quotations omitted)); *see, e.g.*, *Williams*, 503 U.S. at 203 (stating that if the party defending the sentence persuades the court of appeals that the district court would have imposed the same sentence absent the erroneous or harmless factor, then the court of appeals may affirm the sentencing so long as it is reasonable).

44. *Savillon-Matute*, 636 F.3d at 123 (quoting United States v. Keene, 470 F.3d 1347, 1349 (11th Cir. 2006)). In *Keene*, the Eleventh Circuit provided the model for the Fourth Circuit. *Id.* Through *Savillon-Matute* and its progeny though, the Fourth Circuit has developed its own distinct understanding of how the doctrine applies to sentencing appeals.

45. *See Keene,* 470 F.3d at 1349.

46. *See Savillon-Matute*, 636 F.3d at 124 (noting, at the second stage, "we initially give [Savillon-Matute] the benefit of the doubt and assume" the Guidelines range was as he alleged); *see also* United States v. Alvarado Perez, 609 F.3d 609, 622 (4th Cir. 2010) (Shedd, J., concurring) (discussing how an application of the doctrine involves "initially giv[ing] [the defendant] the benefit of the doubt and assume (without deciding) that he is correct" about the Guidelines range).

47. *Savillon-Matute*, 636 F.3d at 123 (quoting *Keene*, 470 F.3d at 1349).

the understanding that the sentence imposed may vary from that advised by the Guidelines.

Applying those two requirements to the case at hand, the *Savillon-Matute* court found them satisfied. First, although the sentencing court "did not specifically state that it would give the same sentence absent the 8-level enhancement, there is no requirement that it do so."[48] The appellate panel was satisfied by the sentencing judge's repeated and "consistent" statements that "it 'absolutely' believed" the sentence was appropriate.[49] With that, the panel was free to assume error and elide any need to resolve the contested Guidelines issue.

Second, the court assumed the defendant's Guidelines range should not have included the eight-level enhancement and examined whether a variance sentence from that lower Guidelines range to the sentence as pronounced was substantively reasonable.[50] Given the defendant's record and the district court's lengthy sentencing colloquy, the *Savillon-Matute* court had no trouble affirming the sentence.[51]

The primary rationale for the doctrine cited by the *Savillon-Matute* court was judicial efficiency. The court disclaimed the necessity or sensibility of setting aside an ultimately reasonable sentence and remanding "the case back to the district court since it has already told us that it would impose exactly the same sentence, a sentence we would be compelled to affirm."[52] Thus, through this approach, the Fourth Circuit expedites review by avoiding potentially complex Guidelines issues and the district court avoids a remand and resentencing for the same defendant.

B. United States v. Hargrove

The next year, the Fourth Circuit returned to the topic of alternate variance sentences in *United States v. Hargrove*.[53] In *Hargrove*, the defendant, who had been convicted of running a large dogfighting operation, challenged the district court's application of enhancements for his planning of and role in the offense and for the offense's victims, all of which raised his Guidelines range from 0–6 months to 41–51 months.[54] The district court rejected the defendant's arguments and further moved upward to impose a statutory maximum 60-month sentence.[55]

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48. *Id.* at 124.
49. *Id.*
50. *See id.*
51. *See id.*
52. *Id.*
53. United States v. Hargrove, 701 F.3d 156 (4th Cir. 2012).
54. *See id.* at 159–60. The district court made clear, too, that it disagreed with the leniency of the Guidelines' treatment of dogfighting as a policy matter. *See id.* at 160–61; *see also* Spears v. United States, 555 U.S. 261, 265–66 (2009) (acknowledging district courts may vary from a Guidelines provision "based on a policy disagreement with those Guidelines").
55. *See id.* at 160. Although there was some ambiguity about whether the district court departed upward under the Guidelines or varied upward under its section 3553 authority, the precise

The district court made clear the deliberateness of its action: "If I had sustained the Defendant's objections and come up with a Guideline range that the Defendant did not object to, I would still have imposed both the upward departure to 60 months and an upward variance to 60 months."[56]

On appeal, the defendant renewed his challenge to the Guidelines enhancements, and the government conceded the district court incorrectly calculated the Guidelines range.[57] However, the government cited *Savillon-Matute* and argued that any Guidelines errors were harmless.[58] The Fourth Circuit agreed.[59]

Before reaching the merits, the *Hargrove* court addressed two challenges to the doctrine's scope. First, the defendant argued for a narrow interpretation of *Savillon-Matute* that did not apply beyond "the unique circumstances of that case."[60] The court declined to adopt such a construction and found *Savillon-Matute* "indistinguishable from this case."[61] The court observed that "the broader question before us [in *Savillon-Matute*] was the reasonableness of the sentence in light of the defendant's claim that his guideline range was miscalculated," the same argument now raised in *Hargrove*.[62]

Second, the defendant challenged alternate variance sentences generally as disincentivizing district judges from carrying out their duty to correctly calculate the Guidelines and, by tolerating procedural errors, corrupting the sentencing process, which could lead to unreasonable sentences.[63] The *Hargrove* court rejected this challenge as well. The court explained that its approach "does not allow district courts to ignore their responsibility to consider the guidelines in a meaningful manner when sentencing a defendant."[64] Moreover, far from corrupting the sentencing process by tolerating errors, the doctrine is used only "in appropriate circumstances . . . where it is clear that an asserted guideline miscalculation did not affect the ultimate sentence."[65]

Satisfied of the doctrine's propriety, the *Hargrove* court applied it. The court had "no difficulty" concluding from the district court's express statements at sentencing that it would have pronounced the same sentence no matter the Guidelines calculation.[66] The court assumed a Guidelines range of 0–6 months

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means are immaterial. *See id.* at 160 n.1; *see also* United States v. Diosado-Star, 630 F.3d 359, 365 (4th Cir. 2011) (quoting United States v. Evans, 526 F.3d 155, 164–65 (4th Cir. 2008)).

56. *Hargrove,* 701 F.3d at 160.

57. *Id.* at 161.

58. *Id.* (citing United States v. Savillon-Matute, 636 F.3d 119, 123–24 (4th Cir. 2010)).

59. *Id.* at 158.

60. *Id.* at 162.

61. *Id.* at 163.

62. *Id.*

63. *See* Reply Brief for Appellant at 8–9, United States v. Hargrove, 703 F.3d 156 (4th Cir. 2012) (No. 11-4818), 2012 WL 730016, at *12–13.

64. *Hargrove*, 703 F.3d at 163.

65. *Id.*

66. *Id.*

as argued by the defendant and analyzed whether a variance upward to the statutory maximum sentence of 60 months was substantively reasonable.[67] After reviewing the rationale of the district court, which stressed the defendant's long-term "barbaric" conduct and "life of cruelty," the court affirmed the sentence.[68] The brevity of the opinion section actually applying the doctrine (a little over one Federal Reporter page) served as a testimonial to its primary rationale—increase judicial efficiency.

C. United States v. Gomez-Jimenez

Savillon-Matute and *Hargrove* might have carved out a place for the doctrine in Fourth Circuit jurisprudence, but the cases did not resolve (nor did they purport to) many issues about the manner in which the doctrine should be applied. In *United States v. Gomez-Jimenez*,[69] the Fourth Circuit rendered a split decision with Circuit Judge Roger Gregory making a spirited dissent about alternate variance sentences both as applied in the case and generally.

Gomez-Jimenez was a consolidated appeal of two defendants convicted for the same drug trafficking activity. At sentencing, defendants objected to the factual predicates for several Guidelines enhancements, including possession of a firearm during drug trafficking, the use of a minor, and occupying a leadership role.[70] After hearing evidence put on by the government at the sentencing hearing, the district court overruled the objections of both defendants to the Guidelines calculations and ultimately sentenced them within the Guidelines range to 180 and 390 months, respectively.[71] When pronouncing each sentence, the district court expressly stated on the record that it would have imposed the same sentence as an alternate variance sentence under the section 3553(a) factors and directly cited to *Savillon-Matute* and *Hargrove*.[72]

On appeal, the defendants resumed their challenges to the Guidelines calculations. The *Gomez-Jimenez* majority looked to see whether the increasingly familiar two requirements for alternate variance sentences had been satisfied.[73] As for knowledge that the district court would have reached the same result, the majority had little trouble finding it was so informed. The district court "expressly stated in a separate and particular explanation that it would have reached the same result, specifically citing to *Savillon-Matute*, *Hargrove*, and its

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67. *Id.*

68. *See id.* at 164–65.

69. United States v. Gomez-Jimenez, 750 F.3d 370 (4th Cir. 2014).

70. *Id.* at 373.

71. *Id.* at 377.

72. *Id.* at 376–77 (citing United States v. Hargrove, 701 F.3d 156, 161 (4th Cir. 2012); United States v. Savillon-Matute, 636 F.3d 119, 123 (4th Cir. 2011); United States v. Keene, 470 F.3d 1347, 1349 (11th Cir. 2006)).

73. Interestingly, of the four Guidelines issues raised by the defendants on appeal, the majority addressed two on the merits and only two through the alternate variance sentence. *Id.* at 383.

review of the [section] 3553(a) factors."[74] Proceeding to the substantive reasonableness analysis, the majority's review of the record showed "that, in each case, the district court provided a thorough and persuasive [section] 3553(a) analysis, carefully considering each of the defendant's arguments."[75] The majority found no cause to declare the sentences substantively unreasonable.[76]

Before concluding, the *Gomez-Jimenez* majority addressed—and predictably rejected—an argument by defendants that the doctrine should only apply in cases of above-Guidelines sentences and not to sentences such as theirs that were within the Guidelines range.[77] The majority noted that harmless error review, upon which the doctrine is predicated, "can apply to all claims of procedural error at sentencing."[78] The majority observed that *Savillon-Matute* had adopted the reasoning of the Eleventh Circuit's decision in *United States v. Keene*, which too involved a within-Guidelines sentence.[79] All that mattered was the clear indication from the district court that the advisory Guidelines were irrelevant to the sentence and that the sentence was reasonable.[80] Accordingly, the majority declined to cabin the doctrine only to sentences imposed above the Guidelines range, recognizing the doctrine's significant breadth.[81]

In dissent, Judge Gregory sharply departed from the majority's doctrinal analysis as applied in *Gomez-Jimenez* and provided the first published arguments from the Fourth Circuit against the doctrine generally.[82]

Judge Gregory disagreed that the panel possessed the requisite knowledge that the district court would have imposed the same sentence despite the district judge's explicit statement.[83] For Judge Gregory, "a simple statement that the court would have imposed the same sentence is [in]sufficient, at least where the imposed sentence exceeds what would have been the Guidelines range absent the procedural error."[84] Because the doctrine assumes the Guidelines range should have been as defendants alleged, which here resulted in a within-Guidelines sentence becoming an above-Guidelines sentence, Judge Gregory found that the record lacked any additional justification for the alternate sentence above the new, assumed Guidelines range.[85] Without a separate justification for the

74. *Id.*
75. *Id.*
76. *See id.* at 384.
77. *See id.* at 384–85.
78. *Id.* at 385.
79. *See id.* Besides the Fourth and Eleventh Circuits, others recognize the potential impact of a district court's determination to impose a specific sentence regardless of a contested Guidelines issue. *See, e.g.*, United States v. Zabielski, 711 F.3d 381, 387–88 & n.3 (3d Cir. 2013); United States v. Jass, 569 F.3d 47, 68 (2d Cir. 2009).
80. *Gomez-Jimenez*, 750 F.3d at 386.
81. *Id.*
82. *Id.* at 386–92 (Gregory, J., concurring in part and dissenting in part).
83. *See id.* at 389.
84. *Id.*
85. *See id.* Moreover, "[t]he absence of such justification for the alternative sentence cannot be more at odds with the perception of fair justice." *Id.* at 390.

variance sentence, a reviewing court could not assume that "the district court would have imposed a sentence within the new [Guidelines] ranges just as it imposed sentences within the erroneous ranges."[86] Accordingly, the panel "cannot be certain that [the district court] would have varied upward without some appropriate and stated justification for doing so."[87]

Stepping back, Judge Gregory criticized the doctrine broadly as unfaithful to the two-step appellate review process established by the Supreme Court in *Gall*.[88] At the first step, the appellate court ensures the absence of significant procedural errors, including Guidelines calculation errors.[89] But the doctrine's prescription to treat Guidelines errors as harmless means that "any procedural error may be ignored simply because the district court has asked us to ignore it."[90] For Judge Gregory, the doctrine's formalized expansion of harmless error analysis means that "[t]he exception has now swallowed the rule."[91]

Because alternate variance sentences permit district courts to "err with respect to any number of enhancements or calculations," the Circuit had effectively "placed *Gall* in mothballs" and "abdicate[d] its responsibility to meaningfully review sentences for procedural error."[92] Judge Gregory found particularly "troubling" that the mere "combination of the district court's statement and a one-sentence argument at the end of the government's brief" brought about this abdication in *Gomez-Jimenez*.[93] Now, the Circuit would engage in meaningful procedural reasonableness review, at least with respect to alleged Guidelines errors, only when "a district court fails to cover its mistakes with a few magic words."[94]

Judge Gregory feared that the doctrine's ultimate effects would be a shift in the judicial balance of power to the detriment of defendants.[95] District courts could rely on the doctrine to "prompt [the Fourth Circuit] to uphold a sentence that otherwise lacks a sufficient justification."[96] With that, "[t]he notion of consistent sentences for similarly situated defendants disappears when errors

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86. *Id.* at 390.

87. *Id.* Although Judge Gregory phrased his objection in terms of the doctrine's knowledge requirement, it also sounds in the aspect of procedural reasonableness review that, apart from correct Guidelines calculations, requires justification for a sentence that deviates from the Guidelines. *See supra* note 25 and accompanying text

88. *See id.* at 391.

89. *Id.* at 390 (citing Gall v. United States, 552 U.S. 38, 46 (2007)) (stating that without the harmless error analysis, district courts would need to justify and explain their "unusually lenient or unusually harsh" sentence as appropriate).

90. *Id.* at 391.

91. *Id.* at 390. Judge Gregory believed that alternate variance sentences should be employed only "in extraordinary circumstances of constitutional importance." *Id.* at 391 n.7.

92. *Id.* at 391.

93. *Id.*

94. *Id.*

95. *See id.*

96. *Id.* at 392.

regarding conduct and enhancements . . . are swept under the rug of harmlessness."[97]

IV. CURRENT STATE OF THE DOCTRINE

Since *Savillon-Matute*, the doctrine of alternate variance sentences has featured in numerous cases. Many times the doctrine has controlled the Fourth Circuit's sentencing analysis.[98] Indeed, at least one Fourth Circuit judge has written to "encourage district courts to consider announcing alternate sentences in cases . . . where the guidelines calculation is disputed."[99] As such, the doctrine remains a font of lively and important debate. This Part synthesizes developments to present a comprehensive state of the doctrine.

The Fourth Circuit has repeatedly construed the threshold requirement of "knowledge that the district court would have reached the same result even if it had decided the [G]uidelines issue the other way."[100] To possess the requisite knowledge, the appellate court must be "'certain' that the result at sentencing would have been the same" regardless of the Guidelines calculation.[101] This presents a "high bar" to establish "knowledge of an identical outcome."[102]

The court has consulted two main evidentiary sources to determine if the knowledge requirement is satisfied: the record of the sentencing proceedings and the sentence itself. Although there is "no requirement" for a sentencing court to "specifically state that it would give the same sentence,"[103] the record must reveal "something more than a review by the district court of the [section] 3553(a) factors . . . particularly since an assessment of those factors is required at

97. *Id.*

98. *See, e.g.*, United States v. Wals, 570 F. App'x 301, 301–02 (4th Cir. 2014) (per curiam) (concluding that even if the calculation under the Guidelines was incorrect, the same sentence was appropriate as a variance); United States v. Partman, 568 F. App'x 205, 213–14 (4th Cir. 2014) (finding that the small degree of variance from the Guidelines range was appropriate under the facts); United States v. Kim, 539 F. App'x 171, 175–76 (4th Cir. 2013) (per curiam) (concluding the variance was not an abuse of discretion); United States v. Ecklin, 528 F. App'x 357, 366 (4th Cir. 2013) (determining that the sentence would have been the same had the Guidelines been decided in the defendant's favor); United States v. Rivera-Santana, 668 F.3d 95, 103 (4th Cir. 2012) (finding the variance was reasonable).

99. United States v. Montes-Flores, 736 F.3d 357, 374 (4th Cir. 2013) (Shedd, J., dissenting).

100. United States v. Savillon-Matute, 636 F.3d 119, 123 (4th Cir. 2011) (citing United States v. Keene, 470 F.3d 1347, 1349 (11th Cir. 2006)).

101. *Montes-Flores*, 736 F.3d at 370 (quoting United States v. Gomez, 690 F.3d 194, 203 (4th Cir. 2012)).

102. *Montes-Flores*, 736 F.3d at 371.

103. *Savillon-Matute*, 636 F.3d at 124.

every sentencing."[104] Without that evidence in the record, the doctrine does not apply.[105]

What constitutes that "something more" has proven to be a case-specific inquiry. The Fourth Circuit has found it in absolute, declarative statements by the district court about the appropriateness of a specific sentence and the irrelevance of a contested Guidelines issue.[106] It also has exhibited itself through a district court's express invocation of *Savillon-Matute* and *Hargrove* in conjunction with a review of the section 3553(a) factors.[107]

Besides statements on the record, the Fourth Circuit has looked to the sentence itself to divine the district court's intent. The court has compared the actual sentence selected to the calculated Guidelines range to gauge whether the Guidelines impacted the district court's decision.[108] Where it has found a within-Guidelines sentence and a standard discussion of the section 3553(a) factors, the court has declined to make assumptions about the district court's motivation.[109] In such a case, it would be difficult to establish knowledge

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104. *Montes-Flores*, 736 F.3d at 370. *See Gomez*, 690 F.3d at 203 ("Although the district court did a commendable job in considering the 18 U.S.C. [§] 3553(a) factors in determining the sentence that it would impose, we are unable to state with any certainty that it would have imposed the same sentence had the sixteen-level enhancement not been in play.").

105. *See* United States v. Perez, 570 F. App'x 309, 312 (4th Cir. 2014) (per curiam) (noting that the "record does not support the conclusion that [the defendant] would have received the same sentences had the district not applied . . . its clearly erroneous [Guidelines] calculation"); United States v. Napan, 484 F. App'x 780, 781 (4th Cir. 2012) (per curiam) (declining to apply doctrine when district court erred in applying Guidelines enhancement and the record revealed only that the district court gave "substantial downward variance from [the] Guidelines range and provided a sufficient explanation for its chosen sentence").

106. *See supra* notes 32–33, 49 and accompanying text; United States v. Pearson, 596 F. App'x 198, 199 (4th Cir. 2015) (per curiam) (finding knowledge satisfied where district court stated at sentencing that disputed Guidelines issue "was not of any determining significance to me in my analysis of the [§] 3553(a) factors. The sentence I have come to is the one that I think is appropriate, even if I am wrong about [the Guidelines issue]"); *see also* United States v. Steele, 573 F. App'x 254, 255 (4th Cir. 2014) (per curiam) (emphasis added) (observing that the sentencing court "expressly indicated that it would have imposed a *higher* sentence if it had statutory authority to do so").

107. *See* United States v. Gomez-Jimenez, 750 F.3d 370, 383 (4th Cir. 2014).

108. *See Savillon-Matute*, 636 F.3d at 121, 122.

109. *See Montes-Flores*, 736 F.3d at 371 (concluding that "[w]here, as here, the district court imposes a within-Guidelines sentence, we cannot assume (much less know) that the court, faced with a much lower advisory range, would have varied upward" to reach the same sentence). At least one Fourth Circuit judge, however, has postulated that even a within-Guidelines sentence by itself could provide the requisite knowledge. Given the advisory nature of the Guidelines and a district court's authority to vary below the Guidelines, Judge Shedd has suggested that a refusal to vary downward makes it "apparent that the district court believed that *nothing less* than [the within-Guidelines sentence imposed] was appropriate." *Id.* at 373 (Shedd, J., dissenting). That approach is likely too broad, particularly where the only indicia of knowledge are the standard discussion of the section 3553(a) factors and a within-Guidelines sentence. Rather than relieve the burden of a potential resentencing, applying the doctrine in such a circumstance arguably burdens district judges who would be willing to resentence a defendant in light of an erroneous Guidelines calculation to say so on the record. *See* United States v. Williams, 431 F.3d 767, 775 (11th Cir. 2005) (Carnes, J.,

"because it is logical to assume that if a district court is content to sentence within whatever the guidelines range happens to be, then a lower range would lead to a sentence within that lower range."[110] However, a sentence substantially above (or below) the Guidelines range can indicate the district court's sentence was steered by considerations beyond the Guidelines, and as such, any possible error in calculating the Guidelines would be irrelevant.[111]

When satisfied of its knowledge that a challenged Guidelines issue did not drive the district court's sentence, the Fourth Circuit moves to substantive reasonableness.[112] At this step, the court makes "a determination [whether] the sentence would be reasonable even if the [G]uidelines issue had been decided in the defendant's favor."[113] The standard precepts of substantive reasonableness review apply to this determination. Most alternate sentences have been affirmed, consistent with the nationally high rates of affirmance as substantively reasonable.[114] However, in light of Judge Gregory's concern that alternate variance sentences would be used to manipulate the appellate court into affirming a sentence it would not have otherwise,[115] it is important to note that the Fourth Circuit *has* vacated alternate sentences as substantively unreasonable.[116]

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concurring) (noting, when first proposing the doctrine in the Eleventh Circuit, that "nothing . . . is meant to imply that a district court is not free to decide a disputed guidelines issue without mentioning, or even considering, whether the result of that decision actually affects the sentence it imposes following consideration of the [section] 3553(a) factors").

110. *Montes-Flores*, 736 F.3d at 372 (Shedd, J., dissenting).

111. *See* United States v. Artis, 554 F. App'x 220, 222 (4th Cir. 2014) (per curiam) (considering for knowledge that the district court imposed an upward variance of 263% from the Guidelines range); United States v. Savillon-Matute, 636 F.3d 119, 122 & n.4, 124 (4th Cir. 2011) (considering for knowledge that the district court imposed a 36-month sentence, which was two to three times that called for by the advisory Guidelines range calculated at sentencing).

112. *See* United States v. Carter, 564 F.3d 325, 328 (4th Cir. 2009) (quoting Gall v. United States, 552 U.S. 38, 51 (2007)).

113. *Savillon-Matute*, 636 F.3d at 123 (quoting United States v. Keene, 470 F.3d 1347, 1349 (11th Cir. 2006)).

114. *See* UNITED STATES SENTENCING COMM'N, 2013 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS Table 59 (2013), *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table59.pdf (providing statistics for fiscal year 2013 about national affirmance rates for substantive reasonableness).

115. *See supra* notes 96–97.

116. *See* United States v. Howard, 773 F.3d 519, 529 n.8 (4th Cir. 2014) (vacating sentence as substantively unreasonable and noting that "the district court's explanation that it would have imposed the same sentence as a variant sentence even if it were determined that its upward departure . . . was an abuse of discretion does not alter our analysis of the substantive reasonableness of Howard's life-plus-sixty-months sentence"); United States v. Baker, 539 F. App'x 299, 306 (4th Cir. 2013) (vacating sentence, despite the district court's specific invocation of *Savillon-Matute*, because the court determined there were Guidelines calculation errors at sentencing such that it "cannot say that the life sentence imposed by the district court is reasonable . . . on the record before us").

V. NORMATIVE CONSIDERATIONS

This Part explores several normative issues implicated by alternate variance sentences—meaning and effect of the Guidelines, judicial balance of power, and a desire for efficiency—and situates them within broader jurisprudential debates. In so doing, this Part addresses how these normative factors might weigh in favor of or against the doctrine.

A. Meaning and Effect of the Guidelines

1. Engagement by the District and Appellate Court with the Guidelines

One possible concern about the doctrine's expansion is that district courts will give short shrift to calculating the Guidelines range, or may even manipulate the calculation to achieve a desired sentencing outcome.[117] However, the doctrine "does not allow district courts to ignore their responsibility to consider the [G]uidelines in a meaningful manner."[118] Beyond the Fourth Circuit's declaration that district courts will meaningfully consider the Guidelines even when they announce an alternate sentence—and implicitly that it may reverse if such consideration was not given—district courts already are obligated by section 3553(a) to engage with the Guidelines.[119] Judges generally can be counted on to take their statutory responsibilities seriously. On balance, the doctrine's treatment of the Guidelines appears consistent with the subtle but crucial distinction that although "[a] court *must* consider" the Guidelines, post-*Booker* it only "*may* be influenced" by them, or it may not.[120]

At the appellate level, the worry is the potential stagnation of Guidelines "law," for lack of a better term. Since their promulgation, appellate courts have interpreted the language and scope of Guidelines provisions, much as they do with statutes.[121] By assuming without deciding outcomes in contested Guidelines issues, the doctrine reduces the opportunities for the Fourth Circuit to engage in Guidelines interpretation. The precise import of this reduction remains to be seen. After all, it does not necessarily mean that the Circuit will never resolve a specific question of Guidelines interpretation; it only may have to wait for a subsequent case that does not present an alternate variance sentence.

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117. In his *Gomez-Jimenez* dissent, Judge Gregory expressed a concern about the latter. *See* United States v. Gomez-Jimenez, 750 F.3d 370, 392 (4th Cir. 2014) (Gregory, J., concurring in part and dissenting in part).

118. United States v. Hargrove, 701 F.3d 156, 163 (4th Cir. 2012).

119. *See* 18 U.S.C. § 3553(a)(4) (2012).

120. United States v. Mendoza-Mendoza, 597 F.3d 212, 217 (4th Cir. 2010) (emphasis added).

121. *See, e.g.*, United States v. Martinez-Santos, 184 F.3d 196, 204 (2d Cir. 1999) ("We use basic statutory construction rules when interpreting the Guidelines.").

Indeed, the Guidelines issue elided by the Fourth Circuit in *Savillon-Matute* was subsequently decided by the court.[122]

2. "Anchoring" Effect

Another concern with the doctrine is its tolerance for the district court's formulation of a sentence that may be influenced, at least subconsciously, by a potentially erroneous Guidelines range. This concern is best viewed through the lens of the "anchoring" effect, a cognitive bias in which a decision-maker "overreli[es] on an initial numerical reference point" when determining an appropriate final judgment.[123] In the sentencing context, the anchoring effect would manifest through "judges irrationally assign[ing] too much weight to the [G]uideline range, just because it offers some initial numbers."[124] Many, including federal judges, subscribe to the Guidelines' potential anchoring effect.[125] And the Fourth Circuit has recognized the potential downstream effects that an erroneous Guidelines calculation could have on the ultimate sentence.[126]

At first glance, the doctrine might appear to bake in any anchoring effects because it does not correct asserted Guidelines errors. However, "judges do not approach sentencing thinking about a single set of 'anchor' numbers—the [G]uideline minimum and maximum—but with multiple numbers from various sources."[127] These other sources, which include the arguments of counsel, victim testimony, the judge's own experience in sentencing prior defendants, and consideration of all the factors set forth in section 3553(a), can prove more

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122. *Compare* United States v. Savillon-Matute, 636 F.3d 119, 123 (4th Cir. 2010) (declining to resolve the categorical status of a Maryland second-degree assault conviction), *with* United States v. Royal, 731 F.3d 333, 340–42 (4th Cir. 2013) (resolving the status of a Maryland second-degree assault conviction); Karimi v. Holder, 715 F.3d 561, 567–70 (4th Cir. 2013) (same).

123. Daniel M. Isaacs, Note, *Baseline Framing in Sentencing*, 121 YALE L.J. 426, 439 (2011) (quoting Birte Englich et al., *Playing Dice with Criminal Sentences: The Influence of Irrelevant Anchors on Experts' Judicial Decision Making*, 32 PERS. & SOC. PSYCHOL. BULL. 188, 188 (2006)).

124. Ryan W. Scott, *Inter-Judge Sentencing Disparity After* Booker*: A First Look*, 63 STAN. L. REV. 1, 45 (2010) (emphasis omitted).

125. *See, e.g.*, United States v. Ingram, 721 F.3d 35, 40 (2d Cir. 2013) (Calabresi, J., concurring) (discussing how anchoring would influence a district judge's selection of a sentence); Nancy Gertner, *What Yogi Berra Teaches About Post-*Booker *Sentencing*, 115 YALE L.J. POCKET PART 137, 138 (2006) ("In effect, the 300-odd page Guideline Manual provides ready-made anchors."); Jed S. Rakoff, *Why the Federal Sentencing Guidelines Should Be Scrapped*, 26 FED. SENT'G REP. 6, 8 (2013) ("[E]ven after *Booker*, the very first thing a judge is still required to do at sentencing is to calculate the Guidelines range, and that creates a kind of psychological presumption from which most judges are hesitant to deviate too far.").

126. *See* United States v. Diaz-Ibarra, 522 F.3d 343, 347 (4th Cir. 2008) (citing Gall v. United States, 552 U.S. 38, 41 (2007); Koon v. United States, 518 U.S. 81, 100 (1996)) ("An error in the calculation of the applicable Guidelines range, whether an error of fact or of law, infects all that follows at the sentencing proceeding, including the ultimate sentence chosen by the district court . . . .").

127. Scott, *supra* note 124, at 46.

persuasive than the Guidelines range.[128] Post-*Booker*, district judges are required to consider all of the sentencing factors, of which the Guidelines are one, but are committed with the discretion to select a sentence driven by factors other than the Guidelines.[129] In that instance, which is the prototypical doctrinal scenario, one would be harder pressed to identify significant ill effects of anchoring because the district court is expressly disclaiming the importance of the Guidelines. Thus, the very nature of alternate variance sentences appears to mitigate in large part—if not entirely—any anchoring effects.

B. Judicial Balance of Power Over Sentencing

The Fourth Circuit's alternate variance sentence cases highlight, and indeed test the boundaries, of a larger struggle post-*Booker* between the district and appellate courts about the proper balance of power over sentencing.[130] The Supreme Court has recognized, as echoed by the Fourth Circuit, the prominence of district courts to the sentencing process based on their unique institutional capabilities.[131] By hearing first-hand the evidence and arguments presented during sentencing and seeing the defendant face-to-face, the sentencing court is more familiar with an individual defendant than any appellate panel.[132] This leaves the sentencing judge "in a superior position to find facts and judge their import under [section] 3553(a)."[133] With these facts, the district court is to

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128. *See, e.g.*, *Ingram*, 721 F.3d at 49–50 & n.7 (Raggi, J., concurring) (contending that district judges, even when sentencing outside the Guidelines, are not irrationally influenced by the anchoring effect); Scott, *supra* note 124, at 46 (arguing that "to the extent the guideline range operates as an irrational 'anchor' just because it supplies some initial numbers, its effects likely are offset by other anchors tugging in different directions").

129. *See, e.g.*, Pepper v. United States, 131 S. Ct. 1229, 1241 (2011) (quoting *Gall*, 552 U.S. at 49, 51) (reaffirming that the district court must give "appropriate consideration of all of the factors listed in [section] 3553(a)"); Rakoff, *supra* note 125, at 8 ("There have been some judges, however, who have taken more seriously the message of *Booker*, and of Section 3553(a) of the U.S. Criminal Code, that the Guidelines are just one of many factors to be considered at sentencing.").

130. *See* D. Michael Fisher, *Still in Balance? Federal District Court Discretion and Appellate Review Six Years After* Booker, 49 DUQ. L. REV. 641, 642 (2011) (observing that since *Booker*, "federal courts have been faced with the challenge of balancing newfound district court discretion with the need to maintain consistent and predictable appellate review of sentencing decisions"); Lindsay C. Harrison, *Appellate Discretion and Sentencing After* Booker, 62 U. MIAMI L. REV. 1115, 1117–18 (2008) (noting that since *Booker* "[w]hat was predicted to be a struggle for power between the Sentencing Commission and the district courts has instead become a struggle between discretion in the courts of appeals and deference to the district courts").

131. *See, e.g.*, United States v. Evans, 526 F.3d 155, 162 (4th Cir. 2008) (quoting *Gall*, 552 U.S. at 52) (discussing Supreme Court precedent requiring deference to the district court's assessment of the proper sentence).

132. *See* Rita v. United States, 551 U.S. 338, 357–58 (2007); *see also id.* at 351 (noting that "the sentencing court subjects the defendant's sentence to the thorough adversarial testing contemplated by federal sentencing procedure").

133. *Gall*, 552 U.S. at 52 (quoting Brief for Federal Public and Community Defenders et al. as *Amici Curiae* at 17, Gall v. United States, 552 U.S. 38 (2007) (No. 06-7949), 2007 WL 2197511 at *16).

"make an individualized assessment"[134] and determine the sentence that is "sufficient, but not greater than necessary."[135] That assessment may lead the district court in its discretion to select a sentence that may be within or outside the advisory Guidelines range. And even if the district court selects a sentence outside the Guidelines range, it is entitled to the same "due deference" on review as any other sentence.[136]

When announcing alternate variance sentences, district courts exercise their discretionary prerogative under section 3553(a) and disclaim that the advisory Guidelines range mattered to their ultimate determinations.[137] As a result, the district court signals to the Circuit that at least the aspect of procedural reasonableness review related to Guidelines errors is unnecessary.[138] And provided the doctrinal conditions are met, the Fourth Circuit has agreed to truncate its own review process.[139]

One could argue, as did Judge Gregory forcefully in *Gomez-Jimenez*, that through the doctrine, the Circuit inappropriately abandons the procedural review mandated by the Supreme Court.[140] The Supreme Court specifically defined procedural reasonableness not to include "failing to calculate (or improperly calculating) the Guidelines range,"[141] and the Circuit should not fail to undertake that review and require accurate Guidelines calculations.[142] In so doing, the Circuit can carry out "its responsibility to meaningfully review sentences for procedural error."[143]

Beyond fulfilling the Supreme Court's expectations about appellate review, the Circuit should not abandon aspects of its procedural reasonableness review because it already has relatively few sentencing review tools in its belt.[144] The doctrine would subtly but significantly shift the judicial balance of power over sentencing further in favor of district courts. A district court, acting purposefully with an eye on the doctrinal requirements, can insulate its Guidelines calculation

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134. *Id.* at 50.

135. 18 U.S.C. § 3553(a) (2012).

136. *Gall*, 552 U.S. at 51.

137. *See generally id.* at 50 (explaining how district courts must make an "individualized assessment" of reasonableness and must only use the Guidelines as "a starting point").

138. *See id.*

139. *See, e.g.*, United States v. Savillon-Matute, 636 F.3d 119, 123–24 (4th Cir. 2011) (declining to resolve alleged procedural error and moving on to substantive reasonableness review).

140. *See supra* notes 90–97 and accompanying text.

141. *Gall*, 552 U.S. at 51.

142. *See* United States v. Lewis, 606 F.3d 193, 201 (4th Cir. 2010) ("Because our standard of review is defined—at least in part—by reference to the advisory Guidelines range, it is unsurprising that we have required the sentencing courts to be faithful to the Guidelines in calculating that range.").

143. *See* United States v. Gomez-Jimenez, 750 F.3d 370, 391 (4th Cir. 2014) (Gregory, J., concurring in part and dissenting in part).

144. *See* Fisher, *supra* note 130, at 672 ("As one of the last lines of defense against unwanted sentencing disparities and the developers of the larger body of sentencing law, the courts of appeals must embrace the tools that the Supreme Court has given them to ensure that district courts continue to exercise guided discretion.").

rulings from review and manipulate the process "to justify reaching the sentence [it] desire[s]."[145] At least in the view of Judge Gregory, that power shift comes at the expense only of "a few magic words."[146]

There are several possible responses to any troubled by the doctrine. First, far from ignoring the Supreme Court's sentencing mandates, the doctrine expressly rests upon the Supreme Court's harmlessness jurisprudence.[147] Second, as for the concern about district courts using the doctrine to manipulate the process towards a desired sentencing outcome, district courts already possess the authority to impose a sentence irrespective of the advisory Guidelines range.[148] In other words, district courts need not jigger the Guidelines numbers when they could simply exercise their discretionary authority under section 3553(a) to sentence outside the Guidelines.[149] And far from abusing this power post-*Booker*, district judges generally "have responded to the increase in their discretionary authority with restraint and moderation."[150]

Third, the doctrine does not leave the appellate court without recourse to vacate an unreasonable sentence.[151] After all, the doctrine only elides procedural reasonableness review, but the sentence in question still must survive substantive reasonableness review.[152] Substantive reasonableness cuts to the quick of the matter and permits the appellate court to determine "whether the sentencing court abused its discretion in concluding that the sentence it chose satisfied the standards set forth in [section] 3553(a)."[153] Far from a guaranteed affirmance,

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145. *See Gomez-Jimenez*, 750 F.3d at 392 (Gregory, J., concurring in part and dissenting in part).

146. *Id.* at 391.

147. *See supra* note 41 and accompanying text.

148. *See* 18 U.S.C. § 3553(a) (2012).

149. *See* Frank O. Bowman III, *Dead Law Walking: The Surprising Tenacity of the Federal Sentencing Guidelines*, 51 HOUS. L. REV. 1227, 1232–34 (2014) ("In practical fact, district court judges are now at liberty to adhere to or ignore guideline ranges as the spirit moves them, subject only to the requirement that a sentence outside the range be accompanied by some explanation which (a) is couched in the gloriously inclusive terminology of 18 U.S.C. § 3553(a), and (b) is not on its face barking mad.") (citations omitted).

150. Amy Baron-Evans & Kate Stith, Booker *Rules*, 160 U. PA. L. REV. 1631, 1742 (2012); *see also* Bowman, *supra* note 149, at 1250 (observing that "for three of the four most common case types in federal court, the system seems to be in rough equilibrium, comfortable with imposing sentences at a modest and fairly standard discount from the sentences called for by the Guidelines and producing average sentences only fractionally lower than those imposed before *Booker*.").

151. *See Gall*, 552 U.S. at 38.

152. *Id.*

153. *Mendoza-Mendoza*, 597 F.3d at 216; *see also* Fisher, *supra* note 130, at 673 (urging that courts of appeals should not shy from "difficult questions related to . . . substantive reasonableness" because the courts will "reduce problems associated with sentencing disparity at the district court level, [and] also begin to build and strengthen a more consistent and reliable definition of substantive reasonableness"); Gerard E. Lynch, *Letting Guidelines Be Guidelines (And Judges Be Judges)*, OSCJL Amici: Views from the Field 5 (Jan. 2008), http://osjclblogspot.com ("If we are going to let (district) judges be judges, and trust them to exercise the necessary discretion with sensitivity to the need for coherent sentencing policy, so we should let (appellate) judges be judges

the Circuit has vacated sentences as substantively unreasonable even when the district court announced an alternate sentence.[154]

Fourth, to the extent the Circuit becomes concerned that district courts are using the doctrine to brush aside the Guidelines, it may always bolster the amount of explanation a district court must provide to justify a sentence. The Fourth Circuit generally prefers more fulsome justifications at sentencing.[155] As we have seen, to be triggered, the doctrine already requires that the district court indicate "something more" than an analysis of the section 3553(a).[156] A district court convinced of the necessity of a particular sentence and wishing to avail itself of the doctrine should have little trouble taking a few more minutes to explain its decision on the record and why any particular contested Guidelines issues were irrelevant. A slightly longer sentencing hearing is a bargain compared to a remand for resentencing. The additional explanation can only redound to the benefit of the reviewing court,[157] the defendant,[158] and even policymakers.[159]

C. Efficiency Gains

As discussed above, the stated goal of the doctrine's proponents is greater efficiency in the form of streamlined sentencing appeals and the avoidance of unnecessary remands for resentencing.[160] This goal serves the need for appellate courts to manage a caseload that leaves them "overburdened" and without "the ability to give each case full attention"[161]—to say nothing of the mirrored need at

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as well, performing their traditional function of reining in excess and gradually developing a 'common law' of what is and is not sensible.").

154. *See supra* note 117 and accompanying text.

155. *See, e.g.*, United States v. Lynn, 592 F.3d 572, 581–85 (4th Cir. 2010) (vacating sentences for inadequate explanation).

156. *See supra* note 104 and accompanying text.

157. *See, e.g.*, Gall v. United States, 552 U.S. 38, 50 (2007) (citing Rita v. United States, 551 U.S. 338, 356–58 (2007)) (requiring district courts to "adequately explain the chosen sentence to allow for meaningful appellate review").

158. *See, e.g.*, *Rita*, 551 U.S. at 367 (Stevens, J., concurring) ("I think the judge's statement to the defendant, made at the time of sentencing, is an especially important part of the criminal process. If the defendant is convinced that justice has been done in his case—that society has dealt with him fairly—the likelihood of his successful rehabilitation will surely be enhanced.").

159. *See* Michael O'Hear, *Explaining Sentences*, 36 FLA. ST. U. L. REV. 459, 484 (2009) (suggesting that policymakers responsible for Guidelines development would benefit from having district judges "think more carefully about individual cases in light of their experiences in sentencing many other cases, and draw explicit connections between their personal insights and the [section] 3553(a) factors" and put it on the record).

160. *See supra* note 52 and accompanying text.

161. Marin K. Levy, *Judicial Attention As A Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals*, 81 GEO. WASH. L. REV. 401, 409 (2013). In that sense, the doctrine is an actualization of a desire expressed by many to find ways "to help the circuit courts run faster." *Id.* at 412.

the district court level.[162] It also is in accord with the Fourth Circuit's oft-expressed desire to not vacate sentences when doing so "would be a pointless waste of resources."[163]

Three observations related to the use of the doctrine as a means to increase efficiency are worth making. The first is the likely unbridgeable divide between Fourth Circuit judges about the extent to which the Circuit should go out of its way to encourage the doctrine's use by district courts.[164] Second, the efficiency rationale is greatly diminished when the Circuit uses the doctrine as alternate grounds for affirming a sentence, after it has already resolved the contested Guidelines issue.[165] Third, the Circuit has not yet addressed the doctrine's potentially far-reaching consequences in post-conviction proceedings, in which the doctrine may foreclose arguments by defendants seeking relief based on erroneous calculations of or subsequent changes to the Guidelines because the Guidelines were irrelevant to the sentence.[166]

VI. CONCLUSION

The foundation and expansion of the doctrine of alternate variance sentences is a key development in Fourth Circuit sentencing jurisprudence. Although the advisory Federal Sentencing Guidelines remain at the procedural heart of the sentencing process, district courts possess the statutory discretion to impose sentences for which the Guidelines range may have been immaterial to the ultimate decision. The doctrine recognizes the district court's discretion by providing a pathway for streamlined appellate review of sentences that holds harmless any possible errors in calculating the advisory Guidelines range. Through its increasingly frequent use, the doctrine promises to have a significant

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162. For instance, in 2013, there were only 602 active and 346 senior federal district court judges. Administrative Office of the Courts, *Judicial Facts and Figures 2013* tbl. 1.1, http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2013/Table101.pdf (last visited Apr. 15, 2015), and 386,781 civil and criminal cases pending in the district court. *See* Administrative Office of the Courts, *Judicial Caseload Indicators: 12-Month Periods Ending March 31, 2005, 2010, 2013, and 2014*, http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/caseload-statistics-2014/judicial-caseload-indicators.aspx (last visited Apr. 15, 2015).

163. United States v. Boulware, 604 F.3d 832, 840 (4th Cir. 2010).

164. *Compare* United States v. Montes-Flores, 736 F.3d 357, 374 (4th Cir. 2013) (Shedd, J., dissenting) (encouraging "district courts to consider announcing alternate sentences in cases . . . where the guidelines calculation is disputed," in part, "to obviate the additional time and expense that a resentencing remand would require"), *with* United States v. Gomez-Jimenez, 750 F.3d 370, 391 n.7 (Gregory, J., dissenting) ("I would hesitate to encourage alternative sentences.").

165. *See, e.g.,* United States v. Lucas, 542 F. App'x 283, 288 n.4 (4th Cir. 2013) (per curiam) (applying the doctrine as alternate reasoning to affirm a sentence after resolving defendant's Guidelines challenge on the merits).

166. *See, e.g.,* United States v. King, No. 1:08CR00041, 2014 WL 1906695, at *16, *17 (W.D. Va. May 13, 2014) (applying the doctrine in post-conviction claim of ineffective assistance of counsel); McGaha v. United States, No. 7:09-CR-131-D, 7:12-CV-68-D, 2013 WL 2418129, at *4 (E.D.N.C. June 3, 2013) (applying the doctrine in post-conviction motion to vacate sentence).

impact on all actors involved in the federal sentencing process and remain an active source of judicial debate.

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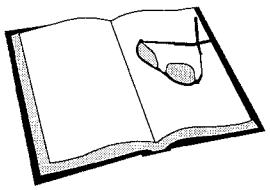

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